

**Thomas Jefferson to George Washington, March 18, 1792, Report on Negotiation with Spain; with Copy, from the Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.**

**REPORT ON NEGOTIATION WITH SPAIN<sup>1</sup> J. MSS.**

1 Cf. with "Heads of Consideration" ( *ante*, pp. 90, 123), and with the first state of this paper on page 391.

The prominence given in this edition to all papers concerning the moot question with Spain is due to the immense importance it had, in a national sense, by its influence upon the whole tide of Western development; by its being the true unifying influence throughout the South, which gave the Democratic party its enduring support from that quarter; and, finally, by its personal bearing on Jefferson's political career.

The question had been from its very origin sectional, being, in truth, the only one which drew a distinct line of cleavage between North and South in the period between 1783 and 1792. Jefferson, in his alienation of Northern sentiment, by his attitude towards the capital, the bank, and general financial policy of the government, had lost all apparent support from that section of the country. And in the South, Patrick Henry, Jefferson's greatest political foe, had constituted himself the champion of the almost united Southern and Western demand for the freedom of the river, certain to end the political career of any aspirant to national office (as Jay's practically had been) who should show any lukewarmness in pressing the claim of the right of Americans to the free use of that river. Only by realizing the importance of this matter, veiled as it was in the actual party

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conflicts of the day, is it possible to understand the constant recurrence of the question, till triumphantly ended by the purchase of Louisiana.

[Mar 18, 1792]

*The appointment of Mr. Carmichael & Mr. Short as Commissioners to Negotiate with the court of Spain a treaty or convention relative to the navigation of the Missisipi, & which perhaps may be extended to other interests rendering it necessary that the subjects to be treated of should be developed, & the conditions of arrangement explained, the Secretary of State Reports to the President of the United States the following:*

Observations on the subjects of negociation between the U. S. of America & the court of Spain, to be communicated by way of instruction to the Commissioners of the U. S. appointed as before mentioned to manage that negotiation.

These subjects are

I. Boundary.

II: The Navigation of the Missisipi.

III. Commerce.

I. As to Boundary, that between Georgia and Florida, is the only one which will need any explanation.—Spain sets up the claim to possessions within the state of Georgia, founded on her having rescued them by force from the British, during the late war. The following view of that subject seems to admit no reply.

The several states, now composing the U. S. of America, were, from their first establishment, separate & distinct societies, dependant on no other society of men whatever. They continued at the head of their respective governments the executive Magistrate who presided over the one they had left, & thereby secured in effect a constant

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amity with that nation. In this stage of their government, their several boundaries were fixed, & particularly the Southern boundary of Georgia, the only one now in question, was established at the 31st. degree of latitude from the Apalachicola Westwardly: & the Western boundary, originally the Pacific ocean, was, by the treaty of Paris, reduced to the middle of the Missisipi. The part which our chief magistrate took in a war waged against us by the nation among whom he resided, obliged us to discontinue him, & to name one within every state. In the course of this war, we were joined by France as an ally, & by Spain & Holland as associates having a common enemy. Each sought that common enemy wherever they could find him. France, on our invitation, landed a large army within our territories, continued it with us two years, & aided us in recovering sundry places from the possession of the enemy. But she did

not pretend to keep possession of the places rescued. Spain entered into the remote Western part of our territory, dislodged the common enemy from several posts they held therein, to the annoyance of Spain, & perhaps thought it necessary to remain in some of them, as the only means of preventing their return. We in like manner dislodged them from several posts in the same Western territory, to wit Vincennes, Cahokia, Kaskaskia &c. rescued the inhabitants, & retained constantly afterwards both them & the territory under our possession & government. At the conclusion of the war, Great Britain, on the 30th of Nov. 1782. by treaty acknowledged our independence & our boundary, to wit, the Missisipi to the West, & the completion of the 31st degree &c. to the South. In her treaty with Spain, concluded seven weeks afterwards, to wit, Jan. 20. 1783, she ceded to her the two Floridas (which had been defined in the Proclamation of 1763.) and Minorca: & by the 8th article of the treaty, Spain agreed to *restore without compensation*, all the territories conquered by her, & not included in the treaty either under the head of cessions or restitutions, that is to say, all except Minorca & the Floridas. According to this stipulation, Spain was expressly bound to have delivered up the possession she had taken within the limits of Georgia to Great Britain, if they were conquests on Great Britain, who was

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to deliver them over to the U. S. or rather she should have delivered them to the U. S. themselves, as standing, *quoad hoc*,

in the place of Gr. Britain: and she was bound by natural right to deliver them to the same U. S. on a much stronger ground, as the real and only proprietors of those places which she had taken possession of, in a moment of danger, without having had any cause of war with the U. S. to whom they belonged, & without having declared any: but on the contrary, conducting herself in other respects as a friend & associate. Vattel. L. 3. 122.

It is an established principle that conquest gives only an inchoate right, which does not become perfect till confirmed by the treaty of peace, & by a renunciation or abandonment by the former proprietor. Had G. Britain been that former proprietor, she was so far from confirming to Spain the right to the territory of Georgia invaded by Spain, that she expressly relinquished to the U. S. any right that might remain in her, & afterwards completed that relinquishment by procuring & consolidating with it the agreement of Spain herself to restore such territory without compensation.—It is still more palpable that a war existing between two nations, as Spain & Gr. Britain, could give to neither the right to seize & appropriate the territory of a third, which is even neutral, much less which is an associate in the war, as the U. S. were with Spain. See on this subject Grotius L. 3. c. 6. § 26. Puffend L. 8. c. 6. § 17. 23.

Vattel L. 3. § 197. 198. On the conclusion of the general peace the U. S. lost no time in requiring from Spain an evacuation of their territory. This has been hitherto delayed by means which we need not explain to that court, but which have been equally contrary to our right & to our consent.

Should Spain pretend, as has been intimated, that there was a secret article of treaty between the U. S. and Gr. Britain, agreeing if, at the close of the war, the latter should retain the Floridas, that then the Southern boundary of Georgia should be the completion of the 32d degree of North latitude, the Commissioners may safely deny all knolege of

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the fact, & refuse conference on any such postulatam. Or should they find it necessary to enter into argument on the subject, they will of course do it hypothetically; and in that way may justly say on the part of the U. S. 'Suppose that the U. S. exhausted by a bloody & expensive war with G. Britain, might have been willing to have purchased peace by relinquishing, under a particular contingency, a small part of their territory, it does not follow that the same U. S. recruited & better organised, must relinquish the same territory to Spain, without striking a blow.

The U. S. too have irrevocably put it out of their power to do it by a new constitution, which guarantees every state against the invasion of it's territory. A disastrous war indeed might, by necessity, supercede this stipulation, (as necessity is above all law) & oblige them to abandon a part of a state. But nothing short of this can justify, or obtain such an abandonment.'

The Southern limits of Georgia depend chiefly on

1. The charter of Carolina to the Lords proprietors in 1663 extending Southwardly to the river Matheo, now called St. John's, supposed in the charter to be in Lat. 31° and 50' West in a direct line as far as the South sea. See the charter in 4.1

1 Mr. Short is desired to purchase this book at Amsterdam, or Paris, as he may not find it at Madrid, & when it shall have answered the purposes of this Mission, let it be sent here for the use of the Secretary of State's office. *T. J.*

*Mémoires de l'Amerique.* 554.

2. On the Proclamation of the British King in 1763. establishing the boundary between Georgia & the two Floridas, to begin in the Missisipi in 31° of lat north of the equator, & running Eastwardly to the Apalachicola; thence along the sd. river to the mouth of the Flint, thence, in a direct line, to the source of St. Mary's river, & down the same to the ocean. This Proclamation will be found in Postlethwayte, voce 'British America.'

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3. On the treaties, between the U. S. and Gr. Britain, of Nov. 30. 1782. & Sep. 1783. repeating & confirming these antient boundaries.

There was an intermediate transaction, to wit, a Convention concluded at the Prado in 1739. whereby it was agreed that Ministers plenipotentiary should be immediately appointed by Spain & Gr. Britain for settling the limits

of Florida & Carolina. The Convention is to be found in the collections of treaties; but the proceedings of the Plenipotentiaries are unknown here. Qu. if it was on that occasion that the Southern boundary of Carolina was transferred from the latitude of Matheo or St. John's river, further north to the St. Mary's? or was it the Proclamation of 1763. which first removed this boundary? [if the Commissioners can procure in Spain, a copy of whatever was agreed on in consequence of the Convention of the Prado, it is a desireable State-paper here.]

To this demonstration of our rights, may be added the explicit declaration of the court of Spain that she would accede to them. This took place in conversations & correspondence thereon between Mr. Jay, M. P. for the U. S. at the court of Madrid, the Marquis de la Fayette, & the Count de Florida Blanca. Mons.<sup>1</sup> de la Fayette, in his letter of Feb. 19. 1783. to the Count de Florida Blanca, states the result of their conversations on limits in these words. 'With respect to limits, his Catholic Majesty has adopted those that are determined by the preliminaries of the 30th of Nov. between the U. S. & the court of London.'—The Ct. de Florida Blanca, in his answer of Feb. 22. to M. de la Fayette, says, 'Altho' it is his Majesty's intentions to abide for the present by the limits established by the treaty of the 30th of Nov. 1782. between the English & the Americans, the King intends to inform himself particularly whether it can be in any ways inconvenient or prejudicial to settle that affair amicably with the U. S.' And M. de la Fayette in his letter of the same day to Mr. Jay, wherein he had inserted the preceding, says, 'on receiving the answer of the

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Count de Florida Blanca (to wit, his answer beforementioned to M. de la Fayette), I desired an explanation respecting the addition

that relates to the limits. I was answered that it was a fixed principle to abide by the limits established by the treaty between the English & the Americans: that his remark related only to more unimportant details, which he wished to receive from the Spanish Commandants, which would be amicably regulated, & *would by no means oppose the general principle*. I asked him before the Ambassador of France [M. de Montmorin] whether he would give me his *word of honor* for it? He assured me *he would*, & that *I might engage it to the U. S.* ' See the Report sent herewith.

### II. The Navigation of the Missisipi.

Our right to navigate that river, from it's source to where our Southern boundary strikes it, is not questioned. It is from that point downwards only, that the exclusive navigation is claimed by Spain; that is to say, where she holds the country on both sides, to wit, Louisiana on the West, & Florida on the East.

Our right to participate in the navigation of that part of the river also, is to be considered under

1. The Treaty of Paris of 1763.

2. The Revolution treaty of 1782.—3.

3. The law of Nature and Nations.

1. The war of 1759–1763. was carried on jointly by Gr. Britain & the 13 colonies, now the U. S. of America, against France & Spain. At the peace which was negotiated by our Common Magistrate, a right was secured to 'the subject of Gr. Britain (the common designation of all those under his government) to navigate the Missisipi, in it's whole breadth & length from it's source to the sea; & expressly that part which is between the

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island of New Orleans, & the right bank of that river; as well as the passage both in & out of it's mouth, & that the vessels should not be stopped, visited or subjected to the payment of any duty whatsoever.' These are the words of the treaty article VII. Florida was at the same time ceded by Spain, & it's extent Westwardly was fixed to the lakes Pontchartrain & Maurepas, & the river Missisipi; & Spain received soon after from France a cession of the island of New Orleans, & all the country she held Westward of the Missisipi: subject of course to our right of navigating between that country and the island, previously granted to us by France. This right was

not parcelled out to us in severalty, that is to say, to each the exclusive navigation of so much of the river as was adjacent to our several shores, in which way it would have been useless to all; but it was placed on that footing, on which alone it could be worth anything, to wit, as a right to all to navigate the whole length of the river in common. The import of the terms, & the reason of the thing, prove it was a right of common in the whole, & not a several right to each, of a particular part. To which may be added the evidence of the stipulation itself, that we should navigate between New Orleans & the Western bank, which being adjacent to none of our states, could be held by us only as a right of common. —Such was the nature of our right to navigate the Missisipi, as far as established by the treaty of Paris.

2. In the course of the Revolution-war, in which the thirteen colonies, Spain & France were opposed to Great Britain, Spain took possession of several posts held by the British in Florida. It is unnecessary to enquire whether the possession of half a dozen posts scattered thro' a country of seven or eight hundred miles extent, could be considered

as the possession & conquest of that country. If it was, it gave still but an inchoate right, as was before explained, which could not be perfected but by the relinquishment of the former possessor at the close of the war. But certainly it could not be considered as a conquest *of the river*, even against Gr. Britain, since the possession of the shores, to wit of the island of New Orleans on the one side, & Louisiana on the other, having



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undergone no change, the right in the water would remain the same, if considered only in it's relation to them: & if considered as a distinct right, independant of the shores, then no naval victories obtained by Spain over Gr. Britain in the course of the war, gave her the colour of conquest over any water which the British fleet could enter, still less can she be considered as having conquered the *river* as against the U. S. with whom she was not at war. We had a common right of navigation in the part of the river between Florida, the island of New Orleans & the Western bank, & nothing which passed between Spain & Gr. Britain, either during the war, or at it's conclusion, could lessen that right. Accordingly at the treaty of Nov. 1782. Gr. Britain confirmed the rights of the U. S. to the navigation of the river, from it's source to it's mouth, & in Jan. 1783. compleated the right of Spain to the territory of Florida, by an absolute relinquishment of all her rights in it. This relinquishment could not include the navigation held by the U. S. in their own right, because this right existed in themselves only, & was not

in Gr. Britain. If it added anything to the rights of Spain respecting the river between the Eastern & Western banks, it could only be that portion of right which Gr. Britain had retained to herself in the treaty with the U. S. held seven weeks before, to wit, a right of using it in common with the U. S. So that as by the treaty of 1763. the U. S. had obtained a common right of navigating the whole river, from it's source to it's mouth; so by the treaty of 1782. that common right was confirmed to them by the only power who could pretend claims against them founded on the state of war, nor has that common right been transferred to Spain by either conquest or cession.

But our right is built on ground still broader, more unquestionable, to wit,

### 3. On the law of Nature & Nations.

If we appeal to this, as we feel it written in the heart of man, what sentiment is written in deeper characters, than that the Ocean is free to all men, & the Rivers to all their inhabitants? Is there a man, savage or civilized, unbiassed by habit, who does not feel &

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attest this truth? Accordingly, in all tracts of country united under the same political society, we find this natural right universally acknowledged & protected by laying

the navigable rivers open to all their inhabitants. When their rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream is in any case obstructed, it is an act of force by a stronger society against a weaker, condemned by the judgment of mankind. The late case of Antwerp and the Scheld was a striking proof of a general union of sentiment on this point: as it is believed that Amsterdam had scarcely an advocate out of Holland, and even there its pretensions were advocated on the ground of treaties, & not of natural right. [The Commissioners would do well to examine thoroughly what was written on this occasion.]—The Commissioners will be able perhaps to find either in the practice or the pretensions of Spain as to the Douro, Tagus & Guadiana, some acknowledgements of this principle on the part of that nation.—This sentiment of right in favor of the upper inhabitants must become stronger in the proportion which their extent of country bears to the lower. The U. S. hold 600.000 square miles of habitable territory on the Mississippi & its branches, & this river and its branches affords many thousands of miles of navigable waters, penetrating this territory in all its parts. The inhabitable grounds of Spain below our boundary, & bordering on the river, which alone can pretend any fear of being incommoded by our use of the river, are not the thousandth part of that extent. This vast portion of the territory of the U. S. has no other outlet

for its productions, & these productions are of the bulkiest kind. And in truth their passage down the river, may not only be innocent as to the Spanish subjects on the river, but cannot fail to enrich them far beyond their present condition. The real interests then of all the inhabitants upper & lower, concur in fact with their rights.

If we appeal to the law of nature & nations, as expressed by writers on the subject, it is agreed by them that, were the river, where it passes between Florida & Louisiana, the exclusive right of Spain, still an innocent passage along it is a natural right in those inhabiting its borders above. It would indeed be what those writers call an imperfect

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right, because the modification of it's exercise depends in considerable degree on the conveniency of the nation thro' which they are to pass. But it is still a right as real as any other right however well defined: & were it to be refused, or to be so shackled by regulations not necessary for the peace or safety of it's inhabitants, as to render it's use impracticable to us, it would then be an injury of which we should be entitled to demand redress. The right of the upper inhabitants to use this navigation is the counterpart to that of those pos-

-sessing the shores below, & founded on the same natural relations with the soil & water, & the line on which their rights meet is to be advanced or withdrawn, so as to equalize the inconveniencies resulting to each party from the exercise of the right by the other. This estimate is to be fairly made, with a mutual disposition to make equal sacrifices, & the numbers on each side are to have their due weight in the estimate. Spain holds so very small a tract of habitable land on either side below our boundary, that it may in fact be considered as a streight of the sea. For tho' it is 80. leagues from our boundary to the mouth of the river, yet it is only here & there, in spots & slips, that the land rises above the level of the water in times of inundation. There are then, & ever must be so few inhabitants on her part of the river, that the freest use of it's navigation may be admitted to us without their annoyance. For authorities on this subject see Grot. ch. 12. c. 2. §. 11. 12. 13. c. 3. §. 7. 8. 12. Puffend. L. 3. c. 3. §. 3. 4. 5. 6. Wolffs inst. §. 310. 311. 312. Vattel. L. 1. §. 292. L. 2. §. 123 to 139.

It is essential to the interests of both parties that the navigation of the river be free to both on the footing on which it was defined by the treaty of Paris. viz. thro' it's whole breadth. The channel of the Missisipi is re-

-markably winding, crossing & recrossing perpetually from one side to the other of the general bed of the river. Within the elbows thus made by the channel, there is generally an eddy setting upwards, and it is by taking advantage of these eddies & constantly crossing

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from one to another of them that boats are enabled to ascend the river. Without this right, the whole river would be impracticable both to the Americans & Spaniards.

It is a principle that the right to a thing gives a right to the means without which it could not be used, that is to say, that the means follow their end. Thus a right to navigate a river, draws to it a right to moor vessels to it's shores, to land on them in cases of distress or for other necessary purposes &c. This principle is rounded in natural reasons, is evidenced by the common sense of mankind, and declared by the writers before quoted. See Grot. L. 2. c. 2. §. 15. Puffend. L. 3. c. 3. §. 8. Vattel L. 2, §. 129. The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their own citizens, by declaring them public (*'flumina publica sunt pax est, populi Romani.'* Inst. 2. T. 1. §. 2.) declared also that the right to the use of the shores was incident to that of the water. Ib. §. 1. 3. 4. 5. The laws of every country probably do the same. This must have been so understood between France & Gr. Britain at the treaty of Paris, when a right was ceded to British subjects to navigate they whole river, & expressly that part between the island of New Orleans, & the Western bank, without-stipulating a word about the use of the shores, tho' both of them belonged to France, & were to belong immediately to Spain. Had not the use of the shores been considered as incident to that of the water, it would have been expressly stipulated; since it's necessity was too obvious

to have escaped either party. Accordingly, all British subjects used the shores habitually for the purposes necessary to the navigation of the river: and when a Spanish governor undertook, at one time, to forbid this, & even cut loose the vessels fastening to the shores, a British frigate went immediately, moored itself to the shore opposite the town of New Orleans, & set out guards with orders to fire on such as might attempt to disturb her moorings. The Governor acquiesced; the right was constantly exercised afterwards, & no interruption ever offered.

This incidental right extends even beyond the shores when circumstances render it necessary to the exercise of the principal right, as in the case of a vessel damaged, where

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the mere shore would not be a safe deposit for her cargo till she could be repaired, she may remove it into safe ground off the river. The Roman law shall be quoted here too, because it gives a good idea both of the extent, & the limitations of this right. Inst. L. 2. T. 1. §. 4. 'Riparum quoque usus publicus est, ut volunt jura gentium sicut et ipsius fluminis usus publicus est. Itaque et navigium ad ripas appellere et funes de arboribus ibi natis religare, et navis onera in his locis reponere, liberum cuique est: sicuti nec per flumen ipsum navigate quisquam prohibetur.' And again §. 5. 'Litorum quoque usus publicus, sive juris gentium, est, ut et ipsius maris: et obid data est facultas volentibus, casas ibi sibi componere, in quas se recipere possint &c.' Again §. 1. 'Nemo igitur ad litora maria accedere prohibetur: veluti deambulare, ant navem appellere, sic tamen ut a villis, id est domiciliis, monumentisque ibi positis, et. ab ædificiis abstineat, nec iis damnum inferat.'<sup>1</sup>

<sup>1</sup> Translations of passages in the Instructions of Mar 18. 1792. to Carm. & Short.

'Flumina publica &c.' rivers belonging to the public, that is to say to the Roman people.

'Riparum &c.'

'The use of the banks belongs also to the public, by the law of nations, as the use of the river itself does, therefore every one is free to moor his vessel to the bank, to fasten his cables to the trees growing on it, to deposit the cargo of his vessel in those places: in like manner as every one is free to navigate the river itself.'

'Litorum &c.'

'The use of the shores also belongs to the public, or is under the law of nations, as is that of the sea itself, therefore it is that those who christ have a right to build huts there, into which they may betake themselves.'

'Nemo &c.'

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‘Nobody therefore is prohibited from landing on the sea-shore, walking there, or mooring their vessel there, so nevertheless that they keep out of the villas, that is, the habitations, monuments & public buildings erected there, and do them no injury.’

‘Gentis amicissimæ.’ ‘The most favored nation.’ *T. J.*

Among incidental rights, are those of having pilots, buoys, beacons, landmarks, lighthouses, &c. to guide the navigators. The establishment of these at joint expence, & under joint regulations, may be the subject of a future convention. In the meantime both should be free to have their own, & refuse those of the other, both as to use & expence.

Very peculiar circumstances attending the river Missisipi require that the incidental right of accomodation on the shore, which needs only occasional exercise on other rivers, should be habitual & constant on this. Sea vessels cannot navigate that river, nor the river vessels go to sea. The navigation would be useless then, without an entrepot where these vessels

might safely deposit their own cargoes, & take those left by the others, & where warehouses & keepers might be constantly established for the safeguard of the cargoes. It is admitted indeed that the incidental right thus extended into the territory of the bordering inhabitants, is liable to stricter modifications in proportion as it interferes with their territorial right. But the inconveniences of both parties are still to have their weight, & reason & moderation on both sides are to draw the lines between them. As to this, we count much on the liberality of Spain, on her concurrence in opinion with us that it is for the interest of both parties to remove completely this germ of discord from between us, & draw our friendship as close as circumstances proclaim that it should be, & on the considerations which make it palpable that a convenient spot placed under our exclusive occupation, & exempted from the jurisdiction & police of their government, is far more likely to preserve peace, than a mere free-port, where eternal altercations would keep us in eternal ill humour with each other. The policy of this measure, & indeed of a much

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larger concession, having been formerly sketched in a paper of July 12. 1790. sent to the Commissioners severally, they are now referred to that.

If this be agreed to, the manner of fixing on that extra territorial spot, becomes highly interesting. The most desirable to us would be a permission to send Commissioners to chuse such spot, below the town of New Orleans, as they should find most convenient.

If this be refused, it would be better now to fix on the spot. Our information is, that the whole country below the town, & for 60. miles above it, on the Western shore, is low, marshy, & subject to such deep inundation, for many miles from the rivers, that, if capable of being reclaimed at all by banking, it would still never afford an entrepot sufficiently safe: that, on the Eastern side, the only lands below the town, not subject to inundation, are at the Detour aux Anglois, or English turn, the highest part of which is that whereon the fort Ste. Marie formerly stood. Even this is said to have been raised by art, & to be very little above the inundations. This spot then is what we would fix on, if obliged now to decide, with from one to as many square miles of the circumjacent lands as can be obtained, & comprehending expressly the shores above & below the site of the fort as far as possible.—But as to the spot itself, the limits, & even whether it shall be extra territorial, or only a free port, & what regulations it shall be laid under, the convenience of that government is entitled to so much

respect & attention, on our part, that the arrangement must be left to the management of the Commissioners, who will doubtless use their best efforts to obtain all they can for us.

The worst footing on which the determination of the ground could be placed, would be a reference to joint Commissioners: because their disagreement, a very probable, nay a certain event, would undo the whole convention, & leave us exactly where we now are. Unless indeed they will engage to us, in case of such disagreement, the highest grounds at the Detour aux Anglois, of convenient extent, including the landings & harbour thereto adjacent. This would ensure us that ground, unless better could be found, & mutually

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preferred, & close the delay of right under which we have so long laboured, for peace sake.

It will probably be urged, because it was urged on the former occasion, that if Spain *grants* to us the right of navigating the Missisipi, other nations will become entitled to it, by virtue of treaties giving them the rights of *the most favored nations*.

Two answers may be given to this. 1. When those treaties were made, no nations could be under contemplation but those then existing, or those, at most,

who might exist under similar circumstances. America did not then exist as a nation: & the circumstances of her position & commerce are so totally dissimiliar to everything then known, that the treaties of that day were not adapted to any such being. They would better fit even China than America, because, as a manufacturing nation, China resembles Europe more. When we solicited France to admit our whale oils into her ports, tho' she had excluded all foreign whale oils, her minister made the objection now under consideration, & the foregoing answer was given. It was found to be solid, & the whale oils of the U. S. are, in consequence, admitted, tho' those of Portugal & the Hanse Towns, & of all other nations are excluded. Again, when France & England were negotiating their late treaty of commerce, the great dissimilitude of our commerce (which furnishes raw materials to employ the industry of others, in exchange for articles whereon industry has been exhausted) from the commerce of the European nations (which furnished things ready wrought only) was suggested to the attention of both negotiators, & that they should keep their nations free

to make particular arrangements with ours, by communicating to each other only the rights of the most favored *European* nation. Each was separately sensible of the importance of the distinction; & as soon as it was proposed by the one, it was acceded to by the other, & the word *European* was inserted in their treaty. It may fairly be considered then as the rational and received interpretation of the diplomatic term 'gentis amicissimæ' that it has



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not in view a nation, unknown in many cases at the time of using the term, & so dissimilar in all cases, as to furnish no ground of just reclamation to any other nation.

2. But the decisive answer is that Spain does not *grant* us the navigation of the river. We have an inherent right to it: & she may repel the demand of any other nation, by candidly stating her act to have been, what in truth it is, a recognition only, & not a grant.

If Spain apprehends that other nations may claim access to our ports in the Missisipi, under their treaties with us, giving them a right to come & trade in all our ports, tho' we would not chuse to insist on express stipulation against them, yet we shall think ourselves justified to acquiesce in fact under any regulations, Spain may, from time to time, establish against their admission.

Should Spain renew another objection which she relied much on before, that the English, at the revolution treaty, could not cede to us what Spain had taken from them by conquest, & what of course they did not possess themselves, the preceding observations furnish sufficient matter for refutation.

To conclude the subjects of boundary & navigation, each of the following conditions is to be considered by the Commissioners as a *sine qua non*.

1. That our Southern boundary remains established at the completion of 31. degrees of latitude on the Missisipi, & so on to the Ocean as has been before described; & our Western one along the middle of the channel of the Missisipi, however that channel may vary, as it is constantly varying, & that Spain cease to occupy, or to exercise jurisdiction in any part Northward or Eastward of these boundaries.

2. That our right be acknowldged of navigating the Missisipi, 'in it's whole breadth & length, from it's source to the sea,' as established by the treaty of 1763.

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3. That neither 'vessels,' cargoes, or the persons on board 'be stopped, visited or subjected to the payment of any duty whatsoever.' Or if a visit must be permitted, that it be under such restrictions as to produce the least possible inconvenience. But it should be altogether avoided, if possible, as the parent of perpetual broils.

4. That such conveniences be allowed us ashore, as may render our right of navigation practicable, &

under such regulations as may bonâ fide respect the preservation of peace & order alone, & may not have in object to embarrass our navigation, or raise a revenue on it. While the substance of this article is made a *sine quâ non*, the modifications of it are left altogether to the discretion & management of the Commissioners.

We might add, as a fifth *sine quâ non*, that no phrase should be admitted in the treaty, which would express or imply that we take the navigation of the Missisipi as a *grant* from Spain. But, however disagreeable it would be to subscribe to such a sentiment, yet were the conclusion of a treaty to hang on that single objection, it would be expedient to waive it, & to meet, at a future day, the consequences of any resumption they may pretend to make, rather than at present those of a separation without coming to any agreement.

We know not whether Spain has it in idea to ask a compensation for the ascertainment of our right.

1. In the first place, she cannot in reason ask a compensation for yielding what we have a right to, that is to say, the navigation of the river, & the conveniences incident to it of natural right.

2. In the second place, we have a claim on Spain for indemnification for nine years exclusion from that navigation, & a reimbursement of the heavy duties (not less for the most part, than 15. per cent on extravagant valuations) levied on the commodities she has permitted to pass to N. Orleans. The relinquishment of this will be no unworthy equivalent

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for any accomodations she may indulge us with beyond the line of our strict right. And this claim is to be brought into view in proper time & manner merely to

be abandoned in consideration of such accomodations.—We have nothing else to give in exchange. For as to territory, we have neither the right, nor the disposition to alienate an inch of what belongs to any member of our Union. Such a proposition therefore is totally inadmissible, & not to be treated of for a moment.

III. On the former conferences on the navigation of the Missisipi, Spain chose to blend with it the subject of Commerce, & accordingly specific propositions thereon passed between the negociators. Her object then was to obtain our renunciation of the navigation, & to hold out commercial arrangements, perhaps, as a lure to us, perhaps however she might then, & may now, really set a value on commercial arrangements with us, & may receive them as a consideration for accomodating us in the navigation, or may wish for them, to have the appearance of receiving a consideration. Commercial arrangements, if acceptable: in themselves, will not be the less so, if coupled with those relating to navigation & boundary. We have only to take care that they be acceptable in themselves.

There are two principles which may be proposed as the basis of a commercial treaty. 1. That of exchanging the privileges of *native citizens*: or 2. those of the *most favored nation*.

1. With the nations holding important possessions in America, we are ready to exchange the rights of native citizens; provided they be extended thro' the whole possessions of both parties. But the propositions of Spain, made on the former occasion, (a copy of which accompanies this) were, that we should give their merchants, vessels, & productions the privilege of native merchants, vessels & productions, thro' the whole of our possessions; & they give the same to ours, only in Spain & the Canaries. This is inadmissible because unequal: and as we believe that Spain is not ripe for an equal exchange on this basis, we avoid proposing it.

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2. Tho' treaties, which merely exchange the rights of the most favored nations, are not without all inconveniences, yet they have their conveniences also. It is an important one that they leave each party free to make what internal regulations they please, & to give what preferences they find expedient to native merchants, vessels & productions and as we already have treaties on this basis with Prance, Holland, Sweden & Prussia, the two former of which are perpetual, it will be but small additional embarrassment

to extend it to Spain. On the contrary, we are sensible it is right to place that nation on the most favored footing whether we have a treaty with them or not: & it can do us no harm to secure, by treaty, a reciprocation of the right.

Of the four treaties before mentioned, either French or the Prussian, might be taken as a model. But it would be useless to propose the Prussians; because we have already supposed that Spain would never consent to those articles which give to each party access to all the dominions of the other: and without this equivalent, we would not agree to tie our own hands so materially in war as would be done by the 23d. article, which renounces the right of fitting out privateers, or of capturing merchant vessels.—The French treaty therefore is proposed as the model. In this however the following changes are to be made.

We should be admitted to all the dominions of Spain, to which any other foreign nation is, or may be, admitted.

Art. 5. Being an exception from a particular duty in Prance will of course be omitted, as inapplicable to Spain.

Art. 8. To be omitted as unnecessary with Morocco, & inefficacious & little honorable, with any of the Barbary powers. But it may furnish occasion to sound Spain on the project of a Convention of the powers at war with the Barbary states, to keep up, by rotation, a constant cruize, of a given force, on their coasts, till they shall be compelled to renounce

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for ever, and against all nations, their predatory practices. Perhaps the infidelities of the Algerines to their treaty of peace with Spain, tho' the latter does not chuse to break openly, may induce her to subsidize *us*, to cruize against them with a given force.

Art. 9. & 10. Concerning fisheries, to be omitted as inapplicable.

Art. 11. The first paragraph of this article, respecting the Droit d'aubaine, to be omitted: that law being supposed peculiar

to France.

Art. 12. Giving asylum in the ports of either to the armed vessels of the other, with the prizes taken from the enemies of that other, must be qualified as it is in the 19th Art. of the Prussian treaty, as the stipulation in the latter part of the article 'that no shelter or refuge shall be given in the ports of the one, to such as shall have made prize on the subjects of the other of the parties' would forbid us, in case of a war between France & Spain, to give shelter in our ports to prizes made by the latter on the former, while the first part of the article would oblige us to shelter those made by the former on the latter; a very dangerous covenant & which ought never to be repeated in any other instance.

Art. 29. Consuls should be received at all the ports at which the vessels of either party may be received.

Art. 30. Concerning Free ports in Europe & America. Free ports in the Spanish possessions in America, & particularly at the Havanna, San Domingo in the island of that name, and St. John of Porto Rico, are more to be desired, than expected. It can therefore only be recommended to the best endeavors of the Commissioners to obtain them. It will be something to obtain for our vessels, flour &c. admission to those ports, during their pleasure. In like manner, if they could be prevailed on to establish our right of cutting logwood in the bay of Campeachy on the footing on which it stood before the treaty of

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1763. it would be desireable, and not endanger to us any contest with the English, who, by the revolution treaty, are restrained to the South Eastern parts of Yucatan.

Art. 31. The *act* of ratification on our part may require a twelvemonth from the date of the treaty, as the Senate meets, regularly, but once a year, & to return it to Madrid for *exchange* may require four months more. It would be better indeed if Spain would send her ratification to be exchanged by her representative here.

The Treaty must not exceed 12. or 15. years duration, except the dames relating to boundary & the navigation of the Missipi, which must be perpetual & final. Indeed these two subjects had better be in a separate instrument.

There might have been mentioned a Third species of arrangement, that of making special agreements, on every special subject of commerce, & of settling a tariff of duty to be paid on each side, on every particular article. But this would require for our Commissioners, a very minute knowledge of our commerce; as it is impossible to foresee every proposition, of this kind, which might be brought into discussion, & to prepare them for it by information & instruction from hence. Our commerce too is, as yet, rather in a course of experiment & the channels in which it will ultimately flow are not sufficiently known to enable us to provide for it, by special

agreement. Nor have the exigencies of our new government, as yet, so far developed themselves, as that we can tell to what degree we may, or must have recourse to commerce, for the purposes of revenue. No common consideration therefore ought to induce us, as yet, to arrangements of this kind. Perhaps nothing should do it, with any nation, short of the privileges of natives, in all their possessions, foreign & domestic.

It were to be wished indeed that some positively favorable stipulations respecting our grain, flour, & fish, could be obtained, even on our giving reciprocal advantages to some other commodities of Spain, say her wines and brandies. But 1. If we quit the ground of the *most favored nation* as to certain articles for our convenience, Spain may insist on

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doing the same for other articles for her convenience; & thus our Commissioners will get themselves on the ground of a *treaty of detail*, for which they will not be prepared. 2. If we grant favor to the wines & brandies of Spain, then Portugal & France will demand the same: & in order to create an equivalent, Portugal may lay a duty on our fish & grain, & France a prohibition on our whale oils, the removal of which will be proposed as an equivalent.

Thus much however, as to grain and flour, may be attempted. There has, not long since, been a considerable duty laid on them in Spain. This was while a treaty on the subject of commerce was pending between us & Spain, as that court considers the matter. It is not generally thought right to change the state of things, pending a treaty concerning them. On this consideration, & on the motive of cultivating our friendship, perhaps the Commissioners may induce them to restore this commodity to the footing on which it was on opening the conferences with Mr. Gardoqui on the 26th day of July 1785.—If Spain says ‘do the same by your tonnage on our vessels, the answer may be that our foreign tonnage affects Spain very little, & other nations very much: whereas the duty on flour in Spain affects us very much, & other nations very little. Consequently there would be no equality in reciprocal relinquishment, as there had been none in the reciprocal innovation: & Spain by insisting on this, would in fact only be aiding the interests of her rival nations, to whom we should be forced to extend the same indulgence. At the time of opening the conferences too, we had as yet not erected any system, our government itself being not yet erected. Innovation then was unavoidable on our part, if it be innovation to establish a system. We did it on fair & general grounds: on ground favorable to Spain; but they had a system, & therefore innovation was avoidable on their part.

It is known to the Commissioners that we found it expedient to ask the interposition of France lately to bring on this settlement of our boundary, & the navigation of the Mississippi. How far that interposition has contributed to produce it, is uncertain. But we have reason to believe that her further interference would not produce an agreeable effect on Spain. The Commissioners therefore are to avoid all further communications on the subject

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with the Ministers of France, giving to them such explanations as may preserve their good dispositions. But if ultimately they shall find themselves unable to bring Spain to agreement on the subject of navigation & boundary, the interposition of France, as a mutual friend, & the guarantee of our limits, is then to be asked, in whatever light Spain may chuse to consider it.

Should the negotiations, on the subject of the navigation & boundary, assume, at any time, an unhopeful aspect, it may be proper that Spain should be given to understand that, if they are discontinued, without coming to an agreement, the government of the U. S. cannot be responsible for the longer forbearance of their Western inhabitants. At the same time the abandonment of the negotiation should be so managed, as that, without engaging us to a further suspension of the exercise of our rights, we may not be committed to resume them in the instant. The present turbid situation of Europe cannot leave us long without a safe occasion of resuming our territory & navigation, & of carving for ourselves those conveniences on the shores which may facilitate & protect the latter effectually & permanently.

We had a right to expect that, pending a negotiation, all things would have remained *in statu quo*, & that Spain would not have proceeded to possess herself of other parts of our territory. But she has lately taken & fortified a new post at the Walnut Hills above the mouth of the Yazoo river, & far above the 31st degree. This garrison ought to have been instantly dislodged, but for our wish to be in friendship with Spain, & our confidence in her assurances 'to abide by the limits established in our treaty with England.' Complaints of this unfriendly & uncandid procedure, may be brought forward, or not, as the Commissioners shall see expedient.